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Nunavunmi Maligaliuqtiit
NUNAVUT COURT OF JUSTICE
Cour de justice du Nunavut

Citation: ***R. v. Nungusuituq, 2019 NUCJ 06***

Date: 20190423
Docket: 09-17-17-II
Registry: Iqaluit

Crown: **Her Majesty the Queen**

-and-

Accused: **Iqadluk Daniel Nungusuituq**

Before: Justice Susan Charlesworth

Counsel (Crown): B. McLaren
Counsel (Accused): Y. Rahamim

Location Heard: Iqaluit, Nunavut
Date Heard: March 22, 2019
Matters: *Criminal Code*, RSC 1985, c C-46, section 244.2(3)(b)
declared unconstitutional pursuant to *Charter of Rights and
Freedoms* section 12. Mr. Nungusuituq is sentenced to
three years incarceration, plus one year probation.

REASONS FOR JUDGMENT

(NOTE: This document may have been edited for publication)

I. INTRODUCTION

- [1] Iqadluk Nungusuituq pleaded guilty to one count of intentionally discharging a firearm while being reckless as to the life or safety of other persons contrary to s. 244.2(1)(b) *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]. The Indictment names three complainants, however, it is important to note that the incident on February 18, 2017, lasted approximately 20 minutes and affected a number of members of the community of Kimmirut.
- [2] Mr. Nungusuituq has brought an application challenging the four year mandatory minimum sentence required by the *Criminal Code*. He has argued that s. 244.2(3)(b) violates s. 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], by amounting to cruel and unusual punishment.
- [3] To decide this application, I must follow the process set out by the Supreme Court of Canada at para 77 in *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773 [*Nur*]:

First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*.

Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the *Charter*.

- [4] I sentenced Mr. Nungusuituq on March 22, 2019, to three years in custody plus probation of one year, and reserved my reasons for doing so and my reasons on the *Charter* application. These are my reasons.

II. ANALYSIS

- [5] I will start my *Nur* analysis by assessing the factors set-out by the Supreme Court of Canada in *R v Smith*, [1987] 1 SCR 1045, 1987 CarswellBC 198, and *R v Morrisey*, 2000 SCC 39, [2000] 2 SCR 90, for what makes a proportionate sentence. The factors are: 1) the

gravity of the offence; 2) the particular circumstances of the case; 3) the particular circumstances of the offender; 4) the actual effect of the punishment on the offender; and 5) the penological goals and sentencing principles.

A. Determining a Proportionate Sentence

(i). The Gravity of the Offence

- [6] It hardly needs to be said that shooting a gun at random in a small community is a grave offence. In this case, a number of people were present during the incident, in which four shots were fired from a rifle over a 15 to 20 minute period in Kimmirut on the night of a community dance. This was a very grave offence: Mr. Nungusuituq's actions of firing his rifle within the small hamlet of Kimmirut undoubtedly had a lasting impact on many members of his community.

(ii). Circumstances of the Case

- [7] Through the Agreed Statement of Facts, as filed by the parties, the Court was advised that Mr. Nungusuituq was 20 years old on February 18, 2017, when he committed the offence in his home community of Kimmirut.
- [8] During the course of the evening, Mr. Nungusuituq attended a dance at the community hall. He became intoxicated on vodka and marijuana, and at some point during the night he was beaten up by some youths. After the assault, he became enraged, went to his home, and obtained his working Ruger .22 calibre hunting rifle.
- [9] Mr. Nungusuituq then went to his father's house, knocked on the door and asked for his father, Ineak Padluq. When Mr. Padluq came to the door, he leaned out to look for his son and then saw his son pointing a rifle at him. When Mr. Nungusuituq realized he was pointing the rifle at his father, he moved the barrel and shot into the air in the direction of the airport. The bullet did not hit Mr. Padluq or his house. Mr. Padluq went inside his house and called the Royal Canadian Mounted Police [RCMP].
- [10] On the night of the incident, after leaving his father's house, Mr. Nungusuituq went back to the area of the community hall. When he got near the fire hall, about 100 feet from the community hall, he fired one shot from the rifle into the air. One of the named victims, Johnny

Manning, witnessed that first shot and started running away when he saw Mr. Nungusuituq point the rifle at him. Another shot was fired, which Mr. Manning believed hit the ground near him.

- [11] Mr. Manning and Mr. Nungusuituq are distant cousins, and they had a good relationship. There had been no tension between them that night, or any other time.
- [12] Sara Sagiatsuq was at the dance and saw Mr. Manning fleeing the hall. She saw Mr. Nungusuituq about 50 feet away and started running. She saw him point the rifle at her. She slipped, heard the rifle fire, and heard the bullet shoot past her shoulder. She heard one shot in total.
- [13] Ms. Sagiatsuq and Mr. Nungusuituq knew each other and did not have any problems with one another before this incident.
- [14] Alashuk Allen was at the community hall with her son and was returning home when she heard there was a man with a gun. She hid under the steps of the hall. Ms. Allen recognized Mr. Nungusuituq as her cousin when he approached and asked who she was. She identified herself to him and said, “don’t shoot; I got kids.” Mr. Nungusuituq replied that no one loved him and he had no friends.
- [15] Ms. Allen was able to get close enough to grab the rifle and with the help of two others was able to get the rifle away, and the clip and ammunition were removed. Mr. Nungusuituq was held by community members until the police arrived.
- [16] The whole incident took 15 to 20 minutes. Mr. Nungusuituq acknowledges firing a total of four shots; he told the police he was not trying to hit anyone, but acknowledged trying to scare kids.

(iii). Circumstances of the Offender

- [17] As noted above, at the time of the offence Mr. Nungusuituq was 20 years old and had had no prior dealings with the police. He is Inuk and suffered a disrupted, abusive childhood, but had become an avid and talented hunter, providing food for his family and community. Mr. Nungusuituq finished Grade X, and was not part of the wage economy. He was living with and caring for his grandfather at the time of the offence.

- [18] After his parents separated, and his mother moved to Cape Dorset, Mr. Nungusuituq lived with his father, Mr. Padluq. He had been continuously assaulted by his father, but when Mr. Padluq was sent to prison, Mr. Nungusuituq went to live with his grandfather.
- [19] Mr. Nungusuituq is close with his grandfather, with an older sister who lives in Kimmirut, and also with his mother and two younger brothers who live in Cape Dorset. He spent periods of time in Cape Dorset as he was growing up.
- [20] Since his arrest on February 18, 2017, Mr. Nungusuituq has been in custody at the Baffin Correctional Centre (BCC), Toronto South Detention Centre for three months – following the BCC riot, in which he had no involvement – and Makigiarvik Correctional Centre. During his time in custody in Nunavut, Mr. Nungusuituq took three programs for which he received certificates of completion: Substance Abuse, Alternatives to Violence, and Inunnguiniq Healthy Families. He also participated in the Inuit Cultural Skills program in 2017 and 2018, and was part of the Town Crew program in October-November 2017 and 2018. Mr. Nungusuituq is to be commended for the efforts he has made toward rehabilitation during his pre-sentence incarceration.

(iv). Penological Goals and Sentencing Principles

- [21] By providing mandatory minimum sentences in s. 244.2(3) of the *Criminal Code*, Parliament has made clear that denunciation, general deterrence, and retribution are to be the primary sentencing objectives in this case. However, *Criminal Code* s. 718 and 718.2(e) demand that other principles also be considered.
- [22] As a young, first-time offender, rehabilitation is an important factor. The programs he took while in custody and the fact that he was doing well before this incident, despite his upbringing, suggest that Mr. Nungusuituq is a candidate for rehabilitation.

A.iv.1. Mitigating Circumstance

- [23] Mitigating circumstances include the lack of a criminal record, Mr. Nungusuituq's young age and that he pleaded guilty. Although this was not an early guilty plea, I am advised by both counsel that the delay was mainly caused by extensive discussions about the proper resolution of this matter, before the matter reached me. It is likely

there would have been an earlier guilty plea if not for the mandatory minimum sentence.

A.iv.2. Aggravating Circumstances

- [24] Aggravating circumstances are Mr. Nungusuituq's intoxication, that he was acting out of anger, and that a total of four shots were fired over a period of 15 to 20 minutes, in a small community.
- [25] Another factor is that Mr. Nungusuituq effectively terrorized a number of people, who could not know he was not aiming at them, over a period of time. Improper use of firearms in small communities must be denounced loudly by this Court.

A.iv.3. Gladue Principle

- [26] Mr. Nungusuituq is Inuk, so I must consider the requirements of s. 718.2(e) of the *Criminal Code* along with the directions of the Supreme Court of Canada regarding the principle of restraint. The particular *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 (CanLII) [*Gladue*] factors in this case include Mr. Nungusuituq's difficult upbringing involving alcohol abuse and violence, a separated family, and his connection to his culture through hunting and fishing to provide sustenance for his community.

A.iv.4. The Parity Principle

- [27] In terms of the principle of parity with other similar cases, I consider two recent Nunavut cases in which sentences of two years less a day were imposed for offences under s. 244.2(1)(a), which involved firing a weapon into a building. Each of those cases involved young Inuk men with no prior records firing one shot, into homes. In *R v Itturiligaq*, 2018 NUCJ 31 (CanLII) [*Itturiligaq*] the shot was in the context of a domestic assault, which is aggravating; in *R v Ookowt*, 2017 NUCJ 22 (CanLII) [*Ookowt*], the offender took a position above a home and deliberately shot into it with no regard for any possible occupants. Although the current case involved four shots, Mr. Nungusuituq told the police the shots were aimed above people, to scare them.
- [28] Another recent decision in Nunavut is *R v Oqallak*, 2018 NUCJ 35 (CanLII), where Cooper J sentenced a youthful first offender on a charge of intentionally discharging a firearm while being reckless as to

the life of safety of others, contrary to s. 244.2(1)(b). This offence involved a total of seven shots over an extended period of three hours, with the offender's two-year-old child in the home with him. The police were in attendance and at one point, Mr. Oqallak fired toward a police officer, who fired back at Mr. Oqallak. Luckily, both shots missed. The fuel tank of a neighbouring home was struck by one shot and was leaking during the standoff. Mr. Oqallak was suicidal at the time, but he had been a contributing member of his community before this incident. Taking into account all of the circumstances, Cooper J imposed a four-year sentence in a case that has serious aggravating circumstances.

- [29] In the Northwest Territories, Charbonneau CJ recently dealt with two cases of offences under s. 244.2(1)(b); the sentences are also helpful in this analysis of the parity principle.
- [30] In *R v Kakfwi*, 2018 NWTSC 30 (CanLII), the accused was drunk and upset, and fired five shots in the air, and several warning shots toward the police and community members during a standoff near a community hall that lasted two and a half hours. Mr. Kakfwi was a 50-year-old with an extensive criminal record, but Charbonneau CJ sentenced him to four years for the intentional discharge offence. He was also sentenced to one-year consecutive for using a firearm in the course of an offence of threatening during the standoff.
- [31] The last case I consider is *R v Cardinal*, 2018 NWTSC 31 (CanLII). Mr. Cardinal fired three shots from a modified shotgun in the drunken, suicidal incident, which led to his charge. Because of the nature of the firearm, the minimum mandatory punishment in this case was five years in custody. Mr. Cardinal had a lengthy criminal record and at the time was prohibited from possessing the type of shotgun that was used. He had a very disordered youth, but had a supportive partner who had died in a motor vehicle accident two years before the offence. In all of the circumstances, Charbonneau CJ imposed a sentence of three and a half years and probation for three years.

(v). Proportionate Sentence

- [32] In my view, a sentence of three years incarceration strikes the appropriate balance between denouncing and deterring recklessly wielding a gun in Nunavut and the true chance at rehabilitation of this youthful, first time offender. A sentence of three years also recognizes

Gladue factors and falls within the range of other recent cases in Nunavut and Northwest Territories.

B. Constitutionality of Mandatory Minimum Sentence in section 244.2(3)(b)

(i). Charter Section 12

[33] The Defence argues that the mandatory minimum sentence of four years is grossly disproportionate to a three-year sentence. I do not agree. For a mandatory minimum sentence to be grossly disproportionate, it must be so much higher than what would have been ordered that the difference would outrage standards of decency or be considered abhorrent or intolerable to society.

[34] The test for gross disproportionality, as was pointed out in *Nur* at para 39, citing Lamer J. (as he then was) in *R v Smith*, [1987] 1 SCR 1045 at 1073, 40 DLR (4th) 435 (1987) (CanLII):

“is aimed at punishments that are more than merely excessive”. He added, “[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation.”

[35] That does not end the question of the constitutionality of the mandatory minimum sentence, however, because the Supreme Court of Canada also said in *Nur* that even if the sentence is not grossly disproportionate in a particular case, if an applicant proposes a reasonable hypothetical in which the mandatory minimum sentence would be contrary to s. 12 of the *Charter*, a Court can find the section to be unconstitutional.

B.i.1. The Reasonable Hypothetical

[36] In this case, the applicant proposed a reasonable hypothetical situation in which he argues that the mandatory minimum sentence would be grossly disproportionate. That reasonable hypothetical is:

an Aboriginal accused has been regularly bullied by the same instigator for a number of years. In a moment of weakness fueled by yet another psychological blow at the hands of his bully, the accused arms himself with a rifle, goes to the bully’s home, and fires the rifle once, aiming above the front door to the residence. The accused then

turns himself into police custody and subsequently pleads guilty in Court.

- [37] This hypothetical essentially blends the facts of the above-noted two recent cases in which respected judges of this court have, for very good and carefully considered reasons, found that the penalty provision in s. 244.2(3)(b) is grossly disproportionate. These two cases consider the issue of imposing mandatory minimum sentences where *Gladue* factors are substantial.
- [38] There are three other cases I believe are relevant and helpful in the reasonable hypothetical analysis, two by the Chief Justice of the Northwest Territories Supreme Court and one from Alberta. Those three cases approve realistic and reasonable hypotheticals.
- [39] Together, the five cases discussed below speak to the experience of people living in remote communities and experiencing the effects of colonialism. They are demonstrations of McLachlin CJ's statements in *Nur* at paragraph 44 that mandatory minimum sentences,
- function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality.
- [40] In *Ookowt*, the accused was Inuk. He was 19 at the time of the offence and was 20 at the time of sentence. Prior to the incident, he had no criminal record. On the day in question, he and a friend were drinking whiskey. Mr. Ookowt was physically attacked and punched in the face before his friend was able to break-up the fight. Mr. Ookowt said he was going to get a gun.
- [41] Despite his high level of intoxication, Mr. Ookowt was able to walk home to retrieve his father's .2250 calibre rifle and position himself on a hill overlooking the attacker's house. He was anxious and upset and feared for his security when he fired one shot from the rifle into a window that was furthest to the left from his vantage point. An occupant was in his living room watching television when the bullet shattered the window and missed him by a few inches.

- [42] On these facts, Johnson J found the mandatory minimum sentence to be cruel and unusual and contrary to *Charter* s. 12, and sentenced Mr. Ookowt to two years less a day, plus probation for one year.
- [43] In *Itturiligaq*, Bychok J, in a very lengthy and fully-reasoned decision, also found s. 244.2(3)(b) to be grossly disproportionate. Mr. Itturiligaq was also a youthful, first-time offender.
- [44] The facts were that Mr. Itturiligaq asked his girlfriend to go home with him, when she was visiting with friends. She refused, and Mr. Itturiligaq got his .243 calibre Remington 7600 rifle and, when she again refused to leave the house, he fired one shot which entered the house above the front door near the roof line. His girlfriend then left the house and came up to him, at which point he struck her on the leg with the rifle butt before returning home.
- [45] Mr. Itturiligaq was sober when the incident occurred and he took full responsibility for his actions in his interview with the police the following day. He had deliberately aimed at the top of the house.
- [46] In both of those cases, the allegation was one contrary to s. 244.2(1)(a) – discharging a firearm into a building and being reckless as to the life or safety of persons in the building. The penalty provision, s. 244.2(3)(b) – the subject of the challenge – is the same for that offence and the offence I have before me.
- [47] Both of these cases considered the special situation of Indigenous offenders charged with offences involving mandatory minimum sentences. Parliament does not appear to have considered *Gladue* principles in its imposition of a mandatory minimum sentence requiring a significant penitentiary sentence. As Bychok J pointed out in *Itturiligaq*, at para 117:

The Commissioners [of the Truth and Reconciliation Commission] noted, in my view correctly, that MMPs [Mandatory Minimum Penalties] undermine the ability of the courts to apply *Gladue* principles. Their call to action is a clarion call that resonates with those of us who live, fish, hunt, work and raise our families here:

Call to Action: 32) We call upon the federal government to amend the *Criminal Code* to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of criminal sentences.

- [48] The Crown reminds me that these cases are under appeal, but that does not mean the reasoning or decisions are wrong.
- [49] The three other recent cases I consider include *R v Hills*, 2018 ABQB 945 (CanLII), in which Jerke J, of the Alberta Court of Queen's Bench, declared s. 244.2(3)(b) unconstitutional for violating *Charter* s. 12. Jerke J is also a Deputy Judge of the Nunavut Court of Justice.
- [50] At para 14 of his decision, Jerke J dealt with a hypothetical "where a young person intentionally discharges an air-powered pistol or rifle such as an airsoft pistol, BB gun, paintball marker, .177 calibre pellet rifle, a .22 calibre pellet pistol or pellet rifle at a residence."
- [51] At para 17, Jerke J found that the hypothetical was reasonable, stating, "[i]t is easy to conceive of situations where a young person might do just as posed in the hypothetical case. Such foolish immature behavior often leads to similar reckless conduct, or even to acts of vandalism. The hypothetical is neither remote nor far-fetched. The Crown concedes this."
- [52] Finally, Charbonneau CJ, Supreme Court of the Northwest Territories, twice ruled that s. 244.2(3)(b) is unconstitutional. Once in *R v Cardinal*, 2018 NWTSC 12 (CanLII) [*Cardinal*] and again in *R v Kakfwi*, 2018 NWTSC 13 (CanLII) [*Kakfwi*], both of which preceded the sentencing decisions referenced above. These cases concerned offences that were similar to this case: an Indigenous person intentionally discharging a firearm and being reckless as to the life or safety of persons, contrary to para 244.2(1)(b). In fact, *Kakfwi* was a more serious iteration of this case, as it involved a standoff in a small community where Mr. Kakfwi fired warning shots at the police and the public while intoxicated and angry.
- [53] Charbonneau CJ found that the mandatory minimum sentence was not a grossly disproportionate penalty for either Mr. Kakfwi or Mr. Cardinal, but she considered a hypothetical that was proposed in the *Cardinal* case. That hypothetical is set out as follows at para 68:

... a young Aboriginal person, suffering from lived and inter-generational trauma, is intoxicated and distressed and attempts to take his own life. He takes a gun from his stepfather's gun closet. The individual puts the gun to his own chin and fires, but in the moment of pulling the trigger the gun is pushed away by a friend or family

member in the room. No one is harmed by the bullet, which exits through an exterior wall in the home.

[54] I agree with Charbonneau CJ at para 70 in *Cardinal* that:

...this hypothetical is [not] far-fetched, fanciful or remote.... Sadly, there is nothing remote about young men in northern Canada struggling with suicidal ideations and arming themselves with firearms in times of distress. There is also nothing remote about young aboriginal people suffering from lived and inter-generational trauma. Courts hear about such circumstances on a routine basis during sentencing hearings. This hypothetical, tragically, is actually very realistic.

[55] I also agree with Charbonneau CJ's reasoning wherein she reached the conclusion that the mandatory minimum sentence of four years imprisonment would be grossly disproportionate for the young Indigenous person in the hypothetical.

[56] All of these cases are persuasive, and I find the careful reasoning in each of them compelling. Charbonneau CJ's cases have not been appealed. Additionally, four of the five cases address an important issue that was not before the British Columbia Court of Appeal, in *R v Oud*, 2016 BCCA 332, namely the circumstances of Indigenous offenders.

[57] I agree that the mandatory minimum sentence set out in s. 244.2(3)(b) constitutes cruel and unusual punishment, contrary to *Charter* s. 12. The reasonable hypotheticals posed by Charbonneau CJ and Jerke J are compelling and convincing, while the discussions in *Ookowt* and *Itturiligaq* on the impact of mandatory minimum sentences on *Gladue* in particular, are sufficient bases to declare s. 244.2(3)(b) contrary to *Charter* s. 12.

(ii). Is the provision saved by *Charter* Section 1

[58] The Crown argues that s. 244.2(3)(b) can be saved through s. 1 of the *Charter*, which provides that the *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be "demonstrably justified in a free and democratic society."

[59] McLachlin CJ considered s. 1 in relation to mandatory minimum sentences in *Nur*, and at para 111 noted, "[i]t will be difficult to show

that a mandatory minimum sentence that has been found to be grossly disproportionate under s. 12 is proportionate as between the deleterious and salutary effects of the law under s. 1.”

- [60] As well, in *R v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130, a case that looked at the mandatory minimum sentence in s. 5(3)(i)(D) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, McLachlin CJ said at para 49 that the Crown had to show “that the impact of the limit on offenders deprived of their rights is proportionate to the good flowing from their inclusion in the law.”
- [61] The Crown has not convinced me that the impact on offenders is proportionate to the good flowing from the mandatory minimum sentence. I have found that the mandatory minimum sentence can result in grossly disproportionate sentences for individuals and I do not agree that the legislation is proportionate.
- [62] In conclusion, I find that the mandatory minimum sentence set out in s. 244.2(3)(a) is unconstitutional, and of no force or effect pursuant to s. 52 *Constitution Act* 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

III. SENTENCE

- [63] I therefore sentence Mr. Nungusuituq to three years in custody. Mr. Nungusuituq has been in custody since February 18, 2017. At a rate of 1.5:1 remand credit, Mr. Nungusuituq has served the equivalent of over three years, therefore, his carceral sentence has been served.
- [64] However, to assist with his reintegration into society, and to give the people of Kimmirut some reparation for the harm done by his actions, I also impose one year of probation. Mr. Nungusuituq, you will have to convince the people of Kimmirut that you have learned your lesson and are not the person you were two years ago. It will not be easy – it will take some time and effort on your part.
- [65] The terms of the probation will be:
- Keep the peace and be of good behaviour,

- Report to the probation officer within 48 hours of your return to Kimmirut and thereafter as required,
- Attend and follow up with any counselling recommended by your probation officer, and
- Complete 50 hours of Community Service – including sharing country food you have harvested – within the first nine months of your probation.

[66] There will be a mandatory firearms and weapon prohibition, pursuant to s. 109 of the *Criminal Code*. Regarding prohibited or restricted firearms, weapons, devices or ammunition, the Order is for life. Regarding other firearms, it will be for ten years. Mr. Nungusuituq may deal with the appropriate authorities regarding a s. 113 exemption for hunting.

[67] A DNA Order is also mandatory.

[68] The firearm, cartridges, and ammunition seized will be forfeited to the Crown.

Dated at the City of Iqaluit this 23rd day of April, 2019

Justice S. Charlesworth
Nunavut Court of Justice